No. 89-1215

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Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

—v.—

JOHNSON CONTROLS, INC.,

Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BY AMERICAN CIVIL LIBERTIES UNION AND ACLU OF WISCONSIN; AMALGAMATED CLOTHING & TEXTILE WORKERS UNION; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; AMERICAN PUBLIC HEALTH ASSOCIATION; AMERICAN SOCIETY OF LAW & MEDICINE; CENTRAL NEW YORK COUNCIL ON OCCUPATIONAL SAFETY & HEALTH; COALITION OF LABOR UNION WOMEN; COMMITTEE FOR RESPONSIBLE GENETICS; COMMUNICATION WORKERS OF AMERICA; EMPLOYMENT LAW CENTER; ENVIRONMENTAL DEFENSE FUND; INTERNATIONAL CHEMICAL WORKERS UNION; MASSACHUSETTS COALITION FOR OCCUPATIONAL SAFETY & HEALTH (MASSCOSH); NATIONAL ABORTION RIGHTS ACTION LEAGUE; 9 TO 5 NATIONAL ASSOCIATION OF WORKING WOMEN;

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INTEREST OF AMICI CURIAE

This brief amici curiae is submitted pursuant to Rule 37.2 of the Rules of this Court and is filed in support of Petitioners.[1/]

Amici are organizations and individuals concerned about the pervasive policies of employers such as Johnson Controls which exclude virtually all women from jobs involving alleged hazard to a potential fetus. Amici have significant expertise that may assist the Court in this case. Specifically, both individually and collectively, amici are knowledgeable about the nature and extent of sex-based exclusionary practices nationwide, and

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1/ The Parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 37.2 of the Rules of this Court.

their effects on the employment rights and health status of all workers.[2/]

INTRODUCTION

The majority of an en banc panel of the Seventh Circuit has concluded, over the vigorous dissents of four of its members (Judges Cudahy, Easterbrook, Flaum and Posner), that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., as amended ("Title VII"), does not prohibit an employment policy that restricts opportunities for women who are willing and able to work, because of the chance that they may become pregnant and that a workplace hazard may harm the fetus. In a radical departure from Title VII law, the court below further concluded that the victims of discrimination bear the burden of proving the policy's invalidity.

The court was asked to review a grant of summary judgment, on a limited record containing material disputes about the employer's evaluation of the risks of employment. Instead of applying the statute as written or remanding for further factual development, the court discredited the plaintiffs' evidence demonstrating that the policy is scientifically insupportable and held that they had not met the newly-imposed burden of proof.

Review by this Court is necessary to clarify the application of Title VII to such sex-based policies, since the courts of appeals have adopted divergent positions. With regard to burden of proof, the Seventh Circuit's holding conflicts with those of the Fourth and Eleventh Circuits

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2/ Individual statements of interest for the amici are set forth in an Appendix to this brief.

and is inconsistent with recent decisions of this Court. Finally, although the court below has placed risk assessment at issue, it has limited the scope of the inquiry in a manner that is at odds with scientific principles and conclusions.

The implications of the case for women's employment rights under Title VII are manifest. Less apparent, but equally significant, are its ramifications for the overall assessment and management of work-place health hazards and for the way in which private dispute resolution affects the development of public health policy.

REASONS FOR GRANTING THE WRIT

I. THE CASE PRESENTS ISSUES OF GREAT PUBLIC IMPORTANCE.

On a record described by Judge Posner in dissent as a "tissue of speculation," Pet.App.72a, the Seventh Circuit has concluded that an employer who plainly

restricts the employment rights of women[3] did not violate Title VII's prohibition on discrimination in employment, because the workers themselves did not prove that the employer's policy was invalid.[4] Instead, the court openly deferred to the employer's decision that it was better for women as a

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3/ Johnson Controls' policy has a "striking sweep." Pet.App. 97a (Easterbrook, J., dissenting). All women are required to disclose whether they are fertile or sterile. No woman physically capable of conceiving will be placed in a job in which any employee has had a blood lead level exceeding 30ug/dl anytime during the past year or in any job that might lead to a promotion to such a job. "As a practical matter, this means every industrial job at Johnson's battery plants. The firm advised its hiring offices to tell women that 'we have no openings for women capable of bearing children.'" Id.

4/ Under Title VII, the employer has always borne the burden of proof to justify a demonstrably discriminatory policy. E.g., Dothard v. Rawlinson, 433 U.S. 321 (1977). That rule has been altered in cases involving disparate impact, but not in those involving intentional discrimination. Compare Wards Cove Packing Co. v. Atonio., ___ U.S. ___, 109 S.Ct. 2115 (1989) with Price-Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775 (1989) (mixed motive). Notwithstanding its questionable relevance, the court below retroactively applied Wards Cove to this case.

class to be sterilized, unemployed, or underemployed, than to risk exposing even a potential fetus to workplace hazards. By requiring courts applying Title VII to ignore the statutory language and instead to "unravel medical mysteries," Pet.App.90a (Easterbrook, J., dissenting), the decision below threatens both millions of working women and their families and the development of rational occupational health care policies. Judge Easterbrook's comment that this "is likely the most important sex discrimination case in any court since ... Congress enacted Title VII," Pet.App.99a, is no exaggeration.

A. The Case Is Of Critical Importance To Working Women And Their Families.

It has been estimated that as many as 20 million women could be affected if policies like Johnson Controls are permissible under Title VII.[5/] Numerous large corporations are known to have similar practices,[6/] and it is believed that such policies are even more pervasive. For example, in the only known attempt to document the prevalence of such practices, the Massachusetts Department of Public Health and the University of Massachusetts Occupational Health Program conducted a study of chemical and manufacturing firms

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5/ Pet.App. 87a (Easterbrook, J., dissenting); id. at 73a (Posner, J. dissenting) ("jobs of millions of women" at stake); EEOC Proposed Rulemaking: Interpretive Guidelines on Employment Discrimination and Reproductive Hazards, 45 Fed. Reg. 7514 (1980) ("as many as 20 million jobs may involve exposure in the workplace to alleged reproductive hazards") (proposed guidelines withdrawn, 46 Fed. Reg. 3916 (Jan. 16, 1981)); U.S. Department of Health and Human Services, 34 Morbidity and Mortality Weekly Report 537, 538 (Sept. 6, 1985) (estimating approximately 15 million workers "exposed to selected agents known or suspected to be toxic to reproductive function"). See also Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. Chi. L. Rev. 1219, 1225-27 (1986) (hereinafter, "Becker").

6/ Becker, supra note 5, at 1240 n.103.

in that state. Responses were voluntary. Nearly 20% of responding companies restricted women allegedly because of concern for fetal health, even though both sexes faced similar reproductive risks.[7/]

Workplace restrictions are most oppressive and extreme in occupations traditionally characterized by entrenched gender-based segregation.[8/] Johnson Controls' policy, effectively excluding women from all employment in its battery plants, is typical of restrictions in the traditionally male, petro-chemical industry where wages are high and women are per-

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7/ Paul, et al., Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work and Health Survey, 16 Am. J. Occ. Med. 267 (1989).

8/ See Becker, supra note 5, at 1237-41.

ceived as marginal workers.[9/] In these jobs, open only recently to women,[10/] sterility has become a term and condition of employment. Indeed, Mary Craig, one of the plaintiffs in this case, submitted to surgical sterilization because she believed that was "the only way [she] would be guaranteed continued employment." Complaint at ¶79(f).[11/]

9/ For example, the policy adopted by the Olin Corporation in 1978 excluded women from five of eleven lines of progression in one division and some jobs elsewhere. Wright v. Olin Corp., 697 F.2d 1172, 1182 (4th Cir. 1982). General Motors' policy "virtually forecloses the employment of women altogether" at its battery plants. Scott, "Keeping Women in their Place", in Double Exposure 180, 181 (Chavkin, ed. 1984). And see Grant v. General Motors, appeal filed (6th Cir., No. 89 - 3478).

10/ See, e.g., Becker, supra note 5, at 1239 n.100.

11/ At American Cyanamid's Willow Island, West Virginia plant, women were initially told they would be excluded from most production jobs if they were fertile. The policy was subsequently narrowed, but only after five women submitted to

(continued...)

Restrictive policies may be less extreme in other industries, but they nonetheless severely limit women's employment opportunities. Both Hayes v. Shelby Memorial Hospital, 726 F.2d 1543 (11th Cir. 1984) and Zuniga v. Kleberg County Hospital, 692 F.2d 986 (5th Cir. 1982), involved x-ray technicians who were fired when they became pregnant, even though both were well within universally accepted safety limits for pregnant women.[12/] Since virtually no activity is risk-free, deference to an employer's analysis of fetal risk could limit women's

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11/ (...continued)
sterilization. Oil, Chemical & Atomic Workers Internat'l Union v. American Cyanamid Co., 741 F.2d 444, 445-46 (D.C. Cir. 1984).

12/ AT&T has also barred pregnant women from jobs at computer chip processing plants because of unconfirmed reports of reproductive hazards. Bureau of National Affairs, Pregnancy and Employment: The Complete Handbook on Discrimination, Maternity Leave, and Health and Safety (1987) at 66.

participation in nearly every area of economic life:

> A female bus or taxi driver is exposed to noxious fumes and the risk of accidents, all hazardous to a child she carries. Would it follow that taxi and bus companies can decline to hire women? That an employer could forbid pregnant employees to drive cars, because of the risk accidents pose to fetuses? For all we can tell, Johnson's argument compels us to answer "yes" to these questions ....

Pet.App.92a (Easterbrook, J. dissenting). Accord, Hayes, 726 F.2d at 1553 n.15.

"[L]ike other controversies of great potential consequence, [this case] demands ... some insight into social reality." Pet.App.61a (Cudahy, J., dissenting). Clearly, for those women whose jobs are at stake, and for their families, restrictive policies, whatever their form, present issues of economic urgency. Judge Coffey's suggestion that women are balancing mere

"financial reward" against the health of their future children, Pet.App.21a, is simply a distortion. The truth is that most women work because they have to; whether in single parent or in two wage-earner households, women's contributions to family income are critical.[13/] Johnson Controls' policy and others like it thus require women to make an impossible choice, between their fertility and their jobs.

These social and economic realities were recognized by Congress more than a decade ago when it specifically prohibited discrimination based on pregnancy:

> The loss of a mother's salary will have a serious effect on the family unit, making it difficult for parents to provide their

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13/ For example, sixty percent of women in the labor force are single, divorced, widowed, or are married to men earning less than $15,000 per year. Women's Bureau, Office of the Secretary, U.S. Department of Labor, Fact Sheet No. 88-2, Facts on Women Workers, ¶9 (1988).

> children with proper nutrition and health care. For some women and their families, it will mean dissipating family savings and security, or being forced to go on welfare.[14/]

Policies restricting women's employment, even if well-intentioned,[15/] have negative health effects. Studies have

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14/ Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 (Comm. Print 1979) at 3 (statement of Senator Williams) (hereinafter "Legis. Hist.").

15/ Johnson asserts a vague "moral" concern for fetuses, but this assertion lacks credibility. As Judge Easterbrook noted, it did not consider the negative effects its policy might have on fetuses. Pet. App. 94a. Nor did it consider either the impact of the policy on current children of female workers or the full range of other serious health effects on adults. See pp. 21-25, infra. The extent to which potential tort liability may have motivated Johnson Controls is unknown on the limited record available. While suits by offspring of both male and female workers are possible, there is no evidence that employers are likely to face significant liability only from children of female workers. See Becker, supra note 5, at 1245. Johnson may have declined to offer this justification because Title VII does not recognize a cost-based defense. E.g., Los Angeles Dep't Water & Power v. Manhart, 435 U.S. 702 (1978).

shown a full range of adverse social and health effects associated with both unemployment and low wage wor. 16/ In particular, poverty and the lack of adequate prenatal care are strongly correlated with low birth weight and prematurity, the causes of most infant morbidity and mortality in the United States.17/ Thus, Judge Easterbrook noted, "Surely Title VII does not allow an employer to adopt a policy that simultaneously makes both women and their children worse off." Pet.App.95a.

As a final matter, although Johnson Controls' policy treats all women as if they will become pregnant, in fact the average woman in this country bears only two children, and working women in particular carefully time and plan their pregnancies.18/ The decision below would exclude most women from Title VII's coverage, allegedly to safeguard their reproductive functions.19/ Others would pay a heavy price, in the loss of procre-

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16/ House and Senate Joint Economic Comm., Estimating the Effects of Economic Change on National Health and Social Well-Being, S. Doc. No. 198, 98th Cong., 2d Sess. 3 (1984). See also Becker, supra note 5, at 1230-31, 1243.

17/ See, Binsacca et al., Factors Associated with Low Birth Weight in an Inner City Population: The Role of Financial Problems, 77 Am. J. Pub. Health 505 (1987). See also U.S. House of Representatives, Select Comm. on Children, Youth and Families, Caring for New Mothers: Pressing Problems, New Solutions, A Fact Sheet and Hearing Summary, (unpublished) (Oct. 24, 1989).

18/ Bureau of the Census, U.S. Department of Commerce, Current Population Reports, Series P-20, No. 427, Fertility of American Women: June 1987 at 9 (1988); Bureau of the Census, U.S. Department of Commerce, Special Demographic Analyses, CDS-80-8, American Women: Three Decades of Change at 8 (1983).

19/ Muller v. Oregon, 208 U.S. 412 (1908), is instructive in revealing how women have historically been restrained by law in ways that promote their childbearing activities and require them to discharge maternal functions in specific ways.

ative freedom, to secure their statutory rights.

B. This Case Is Important To The Development Of Rational Workplace Health Policy.

Under a literal reading of Title VII, as amended by the Pregnancy Discrimination Act ("PDA") 42 U.S.C.§2000e(k), the sole issue for judicial determination in a case challenging a sex/pregnancy-based policy is whether affected women are being treated the same for all employment related purposes as others "similar in their ability or inability to work"?

Nonetheless, the court below ignored the plain language of the statute and adopted an approach which required examination of the scientific validity of Johnson Controls' policy. See generally, Section II, infra. It determined that, in the occupational context, employers are to

be given wide discretion in making risk decisions, Pet.App.49a, even when their policies discriminate, and that the burden of persuasion falls on the victim to prove that such policies are invalid. See infra, note 34.

The rule in the Seventh Circuit thus requires women workers to bear the burden of scientific uncertainty. Other circuits have adopted a different rule. In both the Fourth and Eleventh Circuits, the burden of uncertainty is borne by the employer who must prove the scientific validity and necessity of such a policy.20/ As a

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20/ Specifically, the Seventh Circuit would require workers to disprove, inter alia, (1) that there is a substantial health risk to "the unborn child" and (2) that "transmission of the hazard ... occurs only through women." Pet.App. 25a. In contrast, the Fourth and Eleventh Circuits place the burden on the employer to show "that the body of opinion believing that significant risk [to a fetus] exists is so considerable that, 'an informed employer could not responsibly fail to act on the

(continued...)

practical matter, the allocation of this burden is outcome determinative. Practices that would be defensible under the Seventh Circuit's approach would likely fail to withstand scrutiny under the analysis adopted by the other two circuits.

Inconsistency, however, is only part of the problem. The decision below reveals how litigation focusing on a specific risk may undermine public health goals by failing to take into account the complex process by which public risks are appropriately identified, evaluated, and managed:

> Risk assessment [is]comprised of some or all of the following components: hazard identification, dose-response assessment, exposure assessment, and risk characterization.... [R]isk management combines the risk assessment...with socioeconomic, technical, political, and other considerations, to reach a decision as to whether to control future exposure...and, if so, the level of control.21/

The decision below failed to address some crucial issues of risk assessment and risk management, and as to others, made critical interpretive errors. As a result, its conclusions are at odds with those reached by other courts and public health officials.22/ Specifically, its approach

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20/ (...continued)
assumption that this opinion might be the accurate one.'" Hayes, 726 F.2d at 1548 (citing Wright, 697 F.2d at 1191). The employer's proof that the hazard does not affect male reproductive function must be of similar quality. Id. Evidence that the employer selectively protects against fetal risk would indicate pretext. Id. at 1547-8 n.5.

21/ EPA Proposed Amendments to the Guidelines for the Health Assessment of Suspect Developmental Toxicants, 54 Fed. Reg. 9386, 9389 (proposed Mar. 6, 1989) (hereafter, "Proposed Guidelines for Developmental Toxicants").

22/ These problems are, to some extent, inherent in litigation, which ordinarily focuses on a specific risk, and often fails to examine the alternatives:

> [A] regulatory agency can engage in ad hoc calculations [about risk] because
> (continued...)

is inconsistent with: a) regulatory conclusions about the effects of lead exposure; b) scientific consensus about the mechanisms and effects of reproductive toxicants; c) wide-spread reliance on the significance of experimental (animal) data in making risk assessments; and d) legal doctrines permitting individuals to engage in their own risk-benefit analyses.

a. The court failed to address the range of health effects associated with lead. The Seventh Circuit focused its

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22/ (...continued)
its business is not the dispensation of corrective justice.... Courts and juries, on the other hand, are almost certain to ignore the difficult half of the excess risk calculation, dismissing it as too speculative to be worth the effort. Nevertheless, if prudent risk management is the ultimate objective, we cannot conduct only one half of the risk calculation.
Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 Col. L. Rev. 277, 326 (1985).

inquiry on the nature and extent of potential risk to a fetus. The court provides no explanation or justification for its exclusive focus on fetal risks, and there is, in fact, no basis for concluding that the fetus is entitled to a higher level of workplace protection than workers themselves receive. Nothing in either Title VII or the Occupational Safety and Health Act, 29 U.S.C. §651, et seq., permits this irrational and inherently sex-based approach to workplace health protection. The result in the court below is thus at odds with conclusions reached by federal regulators as to the range of serious risks from lead exposure.23/ The company's

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23/ OSHA specifically found that male workers and their future children require protection from reproductive injury at the same level that Johnson Controls "protects" women, Final Standard for Occupational Exposure to Lead, Medical Surveillance Guidelines, 29 C.F.R. §1910.1025, (continued...)

experts failed to acknowledge these findings.[24] The Seventh Circuit "essentially [took] judicial notice that OSHA is wrong," Pet.App. 94a (Easterbrook, J., dissenting), and approved a policy that recognized only one, sex-specific risk, among many documented risks to which

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23/ (...continued)
Appendix C (1989), and rejected an industry proposal to exclude fertile women from such jobs. Preamble to the Final Standard For Occupational Exposure to Lead, 43 Fed. Reg. 52952, 52966 (1978).

The U.S. Environmental Protection Agency ("EPA") has documented effects on the cardiovascular system in adult males at very low levels of lead exposure, below those set by Johnson Controls for women. EPA Regulation of Fuels and Fuel Additives, Supplemental Notice of Proposed Rulemaking, 50 Fed. Reg. 9401 (1985). The EPA concluded that reduction of lead in gasoline would result in 5,350 fewer myocardial infarctions, 1,115 fewer strokes and 5,160 fewer deaths among white males aged 40 to 59 in 1986 alone. Environmental Protection Agency, Costs and Benefits of Reducing Lead in Gasoline: Final Regulatory Impact Analysis, V-45 (1985).

24/ Because these experts were never subjected to cross-examination at trial, it is not clear how they might have responded to specific questions about the findings of federal health agencies.

federal health officials accord equivalent protection.[25]

b. The court misapprehended the significance of the evidence of male reproductive harm. The circuit court discounted evidence of impairment of male reproductive function. Pet.App. 33a-35a. Its conclusions in this regard are in conflict with an emerging scientific consensus recognizing the significance of all reproductive impairments and the complex process by which toxins operate on the reproductive systems of both men and women:

> 'Reproductive toxicants'... impair reproduction by

25/ Where the conclusions of a regulatory agency have been sustained after careful consideration, see United Steelworkers of America v. Marshall, 647 F.2d 1189, 1256-58 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981), minimally a court should conduct a thorough analysis of the evidence before concluding that health regulators had failed to make appropriate risk assessments. Cf. Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985).

> interfering with or altering normal physiologic processes, regulatory mechanisms, organ function, or the genetic integrity of sperm or egg cells in an exposed person.[26]

The U.S. Environmental Protection Agency ("EPA") makes it plain that exposure of either parent to reproductive toxins can affect not only sexual function and the ability to procreate, but also pregnancy outcome and the health of a future child. Evidence of injury to sperm is highly significant:

> An increase in abnormal sperm morphology has been considered supportive evidence that the agent has gained access to the germ cells. Exposure of males to toxic agents may lead to sperm abnormalities in their progeny.[27]

The National Institute for Occupational Safety and Health ("NIOSH") concludes that:

> All undisputed episodes of occupational disorders of reproduction in the recent past have involved male workers.... The weight of scientific evidence demonstrates that thresholds exist for nonmutagenic reproductive and developmental effects so that exclusionary policies based on sex are inappropriate and unnecessary in principle.[28]

c. The court improperly discounted animal data. The court found that animal

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26/ Ass'n of Schools of Public Health and National Institute for Occupational Safety and Health, Proposed National Strategies for the Prevention of Leading Work-Related Diseases and Injuries, Part 2, at 3 (1988) (hereinafter "NIOSH Proposed National Strategies").

27/ EPA Proposed Guidelines for Assessing Male Reproductive Risk, 53 Fed. Reg. 24850, 24851 (citations omitted) (1988).

> If the effects seen in evaluation of male reproductive end points are the result of mutagenic events (e.g., interaction with germ-cell DNA), then there is potential for transmissible genetic damage.

Id. at 24855. See also Proposed Guidelines for Developmental Toxicants, supra note 21, at 9390 (1988).

28/ NIOSH Proposed National Strategies, supra note 26, at 8-9 (emphasis added).

data demonstrating that lead may cause harm to offspring from paternal exposure was "speculative and unconvincing." Pet.App.34a. As Judge Easterbrook noted, it is an accepted principal of toxicology and risk assessment that animal studies provide valuable, if not essential, data. Pet.App.96a-97a. The history of regulation of toxic exposures reveals the critical relevance of this type of data. For example, thalidomide was known to cause birth defects in some, but not all, animal species before its destructive effects on humans were observed.[29/] If the animal data had been considered more important, the tragic birth defects attributable to that drug might have been avoided.

29/ Proposed Guidelines for Developmental Toxicants, supra note 21, at 9390.

Similarly, before it was discovered that the pesticide DBCP caused sterility in human males, it was known that DBCP caused sterility in male animals.[30/] Indeed, EPA concludes that:

> in almost all cases [of known human developmental toxicants], the experimental animal data would have predicted a developmental effect in humans.

It has thus endorsed the "basic assumption" that:

> an agent that produces an adverse developmental effect in experimental animals is assumed to pose a potential hazard to humans.[31/]

30/ U.S. Department of Labor, Occupational Safety and Health Admin., Occupational Exposure to 1,2-Dibromo-3-Chloropropane (DBCP), 43 Fed. Reg. 11514 (1978). See also EPA Intent to Cancel Registrations of Pesticide Products containing Dibromochloropropane (DBCP), 50 Fed. Reg. 1122 (1985) (DBCP also carcinogenic and mutagenic in animals).

31/ Proposed Guidelines for Developmental Toxicants, supra note, 21 at 9390, 9387. As EPA explains, animal studies can produce information in a short time period, include a large number of subjects, and control for potentially confounding

(continued...)

d. The court would deny individuals the right to make their own risk-benefit assessments. The Seventh Circuit would defer to employers' fetal risk assessments and allow them to impose their value judgments on fully competent adult women. E.g., Pet.App. 49a, 58a. In the medical context, individuals engage in their own risk-benefit analysis, once federal regulators have determined that a particular drug or treatment, although not risk free, is nevertheless effective and beneficial. Physicians and drug manufacturers who have properly tested and manufactured their products, are required

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31/ (...continued)
variables, all of which are difficult when studying humans. Ironically the Seventh Circuit itself relied on animal data in concluding that lead poses a risk to the fetus in utero, since some of the expert opinion it cited was based on animal studies: E.g., Deposition of E.K. Silbergeld, pp.49-52, cited at Pet.App. 15a.

to conform to the standards for obtaining "informed consent" from the patient or, if the patient is a minor (or a fetus), from a parent.32/

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The Seventh Circuit's failure to apply the statute as written requires case by case determinations of workplace risks. The result will be a haphazard and confusing array of policies that may conflict

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32/ See, generally, 1 S. Pegalis and H. Wachsman, American Law of Medical Malpractice at 98-103 (1980) and 2 M. Dixon and F. Woodside, Drug Product Liability § 11.02[1] (1989). A pregnant woman's informed consent is binding on the subsequently born child. Cf. Hughson v. St. Francis Hospital, 459 N.Y.S.2d 814 (N.Y. App. 1984); Roberts v. Patel, 620 F. Supp. 323 (N.D. Ill. 1985); Reiser v. Lohner, 641 P.2d 93 (Utah 1982); Charley v. Cameron, 528 P.2d 1205 (Kan. 1974). Likewise, a warning provided to a pregnant woman, if otherwise adequate, is sufficient to preclude a "failure to warn" claim by the child against the prescription drug manufacturer. See, e.g., Needham v. White Laboratories, 847 F.2d 355 (7th Cir. 1988), cert. denied, 454 U.S. 927 (1981); Walker v. Merck & Co., Inc., 648 F. Supp. 931 (M.D. Ga. 1986), aff'd, 831 F.2d 1069 (11th Cir. 1987).

with each other and with the work of federal health officials. As Judge Easterbrook noted:

> It is painful to see conflicts of this kind settled by litigation; judges cannot unravel medical mysteries by observing scientists' demeanor on the stand. This is not how scientists resolve disputes among themselves .... Scientists formulate hypotheses, collect data, and apply statistical methods to assess them; judges and jurors find this process alien.[33/]

33/ In litigation, scientific developments become frozen in time; the record is merely a snapshot of developments at a particular moment. But the scientific process is continuing. The inquiry is shaped by assumptions that derive, in part, from social forces. Once there is consensus as to the relevant assumptions, scientific knowledge accrues through an evolutionary process. See T. Kuhn, The Structure of Scientific Revolutions (2d. ed. 1970). At that point, developments may occur at a rapid pace, supported by simultaneous refinements of technology and methodology.

Crises involving thalidomide and other drugs focused research attention on female-mediated birth defects. U.S. Department of Health and Human Services, 34 Morbidity and Mortality Weekly Report 537, 538 (Sept. 6, 1985). Less attention has been directed at male-mediated reproductive effects.

(continued...)

II. REVIEW IS NEEDED TO RESOLVE CONFLICTS AMONG THE CIRCUITS REGARDING THE CONSTRUCTION AND APPLICATION OF TITLE VII OF THE CIVIL RIGHTS ACT.

This case involves critical issues regarding the meaning and applicability of Title VII and the PDA in challenges to "fetal protection" policies. On these issues, the Seventh, Fourth and the Eleventh Circuits have taken inconsistent approaches, and definitive guidance is necessary. See EEOC v. University of Pennsylvania, ___ U.S. ___, 58 U.S.L.W. 4093, 4094 (January 9, 1990).[34/] Review is

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33/ (...continued)
Becker, supra note 5, at 1259 n.170. This does not constitute evidence of differential sensitivity, but rather may simply reflect that the inquiry is at a different point in the evolutionary process. See Needleman and Bellinger, Commentary, 46 Envtl. Res. 190 (1988).

34/ Petitioners have addressed in some detail the conflict in the circuits with regard to burden of proof. See Petition at 11, 17-21. Pursuant to

(continued...)

further needed because lack of uniformity and consistency in the courts has presented grave problems for effective enforcement of Title VII, as is evident from efforts of the Equal Opportunity Enforcement Commission ("EEOC") to reconcile the various appellate court decisions with its own obligation to give effect to the statutory mandate.

A. Review Is Needed To Clarify The Meaning Of The PDA.

The PDA was enacted to insure that women would not remain marginal workers, limited by assumptions about pregnancy and its effects on their capacity to work.35/

34/ (...continued)
Rule 37.1 of the Rules of the Supreme Court, Amici do not present additional argument that this significant conflict merits the Court's review of this case, but endorse and adopt Petitioner's argument.

35/ The PDA provides:

> The terms 'because of sex' or 'on the
> (continued...)

Its legislative history emphasizes the serious social and economic costs of employment discrimination against pregnant women.36/ This case represents an opportunity for the Court to clarify the meaning and application of this important federal law. The Court has construed the PDA on two prior occasions, but in neither instance did it address the primary focus of the Act, employment discrimination

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35/ (...continued)
> basis of sex' include ... because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment purposes ... as other persons not so affected but similar in their ability or inability to work. 42 U.S.C. §2000e(k).

36/ These costs include the "devastating impact which the loss of a working mother's salary [would] have on the family unit." Legis. Hist., supra, note 14, at 116 (Statement of Senator Williams). See pp. 12-15, supra.

against women who are or may become pregnant.[37]

The PDA makes "distinctions based on women's ability to bear children sex discrimination," Pet.App.76a (Easterbrook, J., dissenting) and therefore mandates the conclusion that Johnson Controls' policy is not neutral.[38] The Seventh Circuit majority virtually ignored the PDA. Rather, the court purported to rely on

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37/ Newport News Shipbuilding and Dry Dock v. E.E.O.C., 462 U.S. 669 (1987) considered the validity of a health plan that provided female employees with benefits for pregnancy related conditions, but denied equivalent benefits to the spouses of male workers. In California Federal Savings and Loan Association v. Guerra, 479 U.S. 272 (1987), the Court considered whether a state statute requiring employers to provide leave and reinstatement only to pregnant women was preempted by Title VII.

38/ Judge Posner agrees that the PDA "shows that the present case really is a disparate treatment case, that is, a case of intentional discrimination ...." Pet.App. 65a.

Wright v. Olin, 697 F.2d 1172, and Hayes v. Shelby Memorial Hospital, 726 F.2d 1543.[39]

In Wright, the court rejected the argument that the PDA required the case to be analyzed as one of overt discrimination: "Without regard to whether that would make any difference on the facts of this case, we reject it as conceptually unsound...." 697 F.2d at 1184 n.17. Without further mention of the PDA, the Court concluded that the disparate impact/business necessity model was best suited for analysis of such an exclusionary policy,[40] in part

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39/ As explained below, those courts took different approaches to the effect of the PDA. However, because the elements of the rebuttal case as set forth in Hayes parallel those of the business necessity defense articulated in Wright, see Hayes, 726 F.2d at 1548 n.8, the Johnson majority was able to find the approaches taken by the Fourth and Eleventh Circuits similar. Pet.App. 24a-25a.

40/ It stated that while the "facial neutrality" of the rule might be subject to logical

(continued...)

because the policy could never be defended as a bona fide occupational qualification ("BFOQ"), id. at 1185 n.21, the only statutory defense for intentional discrimination. 42 U.S.C. 2000e-2(e). See Los Angeles Dep't Water & Power v. Manhart, 435 U.S. 702 (1978).

Unlike the Seventh and the Fourth Circuits, the Eleventh Circuit did "tend to agree" that the hospital's restrictive policy presented a case of overt discrimination to which the only affirmative defense is BFOQ. Hayes, 726 F.2d at 1547-48. It nevertheless treated the policy as merely raising a presumption of facial discrimination which could be rebutted by evidence showing that it was neutral "in the sense that it effectively and equally

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40/ (...continued)
dispute, the dispute would involve "mere semantic quibbling." Wright, 697 F.2d at 1186.

protects the offspring of all employees." But see Connecticut v. Teal, 457 U.S. 440 (1982) and Manhart, 435 U.S. at 716-17.

Decisions in the Seventh, Eleventh and Fourth Circuits are thus in substantial disarray with regard to the significance of the PDA. In contrast, they are uniform in their apparent reliance on benign motive to justify a departure from the statutory scheme. Although it is well-established in Title VII that good faith or benign motive is not a defense to discrimination,41/ these courts have altered the rules in cases involving patently discriminatory policies allegedly intended to protect

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41/ Albemarle Paper Co. v. Moody, 422 U.S. 405, 422-23 (1975). Cf. Orr v. Orr, 440 U.S. 268 (1979) (equal protection case). A showing of a facially discriminatory policy triggers the employer's affirmative obligation to prove the existence of a BFOQ. Cf. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121-22 (1985) (age discrimination case). See also Petition at 17-19, 25-26.

against fetal harm. Defendants may not simply pick and choose among defenses, however, the defense must match the prima facie case.

B. Review Is Required To Define The BFOQ Defense.

The Seventh Circuit held, in the alternative, that Johnson Controls' policy was justified as a BFOQ. In this respect, it conflicts with both Wright and Hayes. Both the Fourth and Eleventh Circuits explicitly acknowledged that a sex-based rule barring fertile women could not meet the stringent BFOQ standard because there was no showing or even assertion that women were unable to perform the jobs at issue. Wright, 697 F.2d at 1185 n.21; Hayes, 726 F.2d at 1549. As Judge Easterbrook noted, the PDA "has a built-in BFOQ standard: unless pregnant employees differ from others 'in their ability or inability to

work,' they must be treated 'the same' as other employees." Pet.App. 73a.

Johnson Controls does not assert that women are incapable of performing the jobs from which they are barred. The Seventh Circuit concluded, however, that the "industrial safety-based concern of protecting the unborn child from lead exposure" was part of the "essence" of Johnson Controls' battery-making business, and that the sex-based policy was reasonably necessary to further this objective. Pet.App. 54a. Overall, the court construed the BFOQ defense to "give meaningful and thoughtful consideration to the interests of all those affected by a company's policy, in this case the employer, the employee and the

unborn child." Pet.App. 42a (emphasis in original).42/

Until the Seventh Circuit's decision below, neither this Court nor any federal appellate court conducting a BFOQ analysis had ever held that the essence of the business extends beyond the specific requirements and demands of the particular job.43/ Cf., e.g., Western Air Lines, Inc.

42/ The court below adopted a policy of deference to employers' decisionmaking in its BFOQ analysis. Pet.App.49a. This constitutes yet another serious erosion of important Title VII principles. Cf. Washington v. Davis, 426 U.S. 229, 247 (1976) (Title VII prohibits deference to the "seemingly reasonable" acts of employers); Criswell, 472 U.S. at 421-22 and n.36 (employers required to show more than a "rational basis in fact" to satisfy BFOQ standard of Age Discrimination in Employment Act).

43/ Even customer preferences do not justify facial discrimination, as the Seventh Circuit itself has recognized. See Rucker v. Higher Education Aids Board, 669 F.2d 1179, 1181 (7th Cir. 1982) (black clientele's preference for black counselors does not justify racial discrimination); Fernandez v. Wynn Oil Co. 653 F.2d 1273, 1276-77 (9th Cir. 1981) (customer preference does not (continued...)

v. Criswell, 472 U.S. 400 (1985) (essence of airline's business is safe transportation of passengers); Dothard v. Rawlinson, 433 U.S. 321 (1977) (essence of prison official's job is to maintain prison control and security); Tullis v. Lear School, Inc., 874 F.2d 1489 (11th Cir. 1989) (essence of school bus driver's business is safe transport of passengers); Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987) (essence of business is to provide role model for adolescent girls). There is simply no basis for the Seventh Circuit's conclusion that the statute permits employers to stand in loco parentis for the potential fetuses

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43/ (...continued)
qualify gender as a BFOQ); Diaz v. Pan American World Airways, 442 F.2d 385, 389 (5th Cir.), cert. denied, 404 U.S. 950 (1971) (customer preference for female flight attendants does not justify policy excluding males).

of its women workers. Such a result would be beyond the scope of the BFOQ provision and directly contrary to the PDA.44/

C. Review Is Necessary To Provide Guidance To The Enforcement Agency.

The EEOC's duty to enforce Title VII imposes practical demands to investigate and litigate cases in all jurisdictions. Conflicts among the circuits on the appropriate framework for analyzing "fetal hazard" cases have made this a virtually impossible task. This is evident from the EEOC's recent effort to clarify its approach. See EEOC, Policy Guidance on

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44/ While achieving workplace safety is a laudable and desirable goal, it should not and need not be accomplished at the cost of prohibited forms of employment discrimination. The potential for such discrimination extends to all workers, as genetic characteristics may be associated with differential susceptibility to workplace hazards. While the ability to predict such susceptibility may be useful to individuals in making employment decisions, these predictive tools should not be used as a basis for discrimination.

United Auto Workers v. Johnson Controls, Inc., Daily Lab. Rep. (BNA) No. 18, at D-1 (January 26, 1990). (Pet.App. 127a, et seq.).45/

As the EEOC observes, the Seventh Circuit's decision in this case represents a "significant departure from the analytical framework previously developed by the courts." The EEOC has thus termed "problematic" the Seventh Circuit's "hybrid approach" to a claim of facial discrimination:

> [I]t is more consistent with Title VII's structure and purpose to allow a defendant in a case challenging a facially discriminatory fetal protection policy only the statutory defense of

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45/ Previously, in the Policy Statement on Reproductive and Fetal Hazards under Title VII, 8 Fair Empl. Prac. Manual (BNA) 401:6013 (Oct. 3, 1988), the EEOC had recognized that exclusionary policies constitute overt sex discrimination, "per se violations" of Title VII. As an interim measure, it instructed its staff to follow the lead of the existing court decisions.

> proving that sex is a 'bona fide occupational qualification...'

Pet.App. 134a (citations omitted).

The Commission's position, however, leaves unresolved a number of key issues. Recognizing the conflicting rules in the circuits with regard to the appropriate defense and the type of evidence that would establish it, the Commission frankly requests "judicial interpretation of the language of the BFOQ provision." Pet.App. 135a. In part, because of the "reality" that each of the circuit courts has permitted some defense to an exclusionary policy, id. at n.6, the Commission is "unwilling to say that no possible defense is available," id. Nevertheless, it recognizes "considerable merit" in Judge Easterbrook's views to that effect. Id. at n.7.

In sum, the Commission is torn between the practical necessity to investigate and prepare cases for courts that have permitted defenses and the obligation to enforce the statute as written. The lack of consensus in the courts has created overwhelming enforcement difficulties, which can only be resolved by guidance from this Court, as the EEOC itself suggests.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Statements of Interest of *Amici Curiae*

The **AMERICAN CIVIL LIBERTIES UNION (ACLU)** is a nationwide, non-partisan organization of over 250,000 members. The Women's Rights Project of the ACLU Foundation was established to work toward the elimination of the pervasive problem of gender-based discrimination. It has participated in the litigation of many cases challenging sex discrimination in employment and discrimination against women of child-bearing capacity. The **American Civil Liberties Union of Wisconsin** is the Wisconsin state affiliate of the ACLU.

The **AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION (ACTWU)** is an international trade union, with 260,000 members in the apparel, textile and related industries. It has many members -- both women and men

-- exposed to lead and other reproductive chemical hazards in a wide variety of industries. Many of these workers would be directly affected by the principles established in this case.

The **AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW)**, a national organization of over 140,000 college-educated women and men, is strongly committed to promoting and achieving legal, social, educational and economic equity for women. For more than a century AAUW has worked toward those goals by responsible participation in public policy issues at local, state, national and international levels. AAUW supports constitutional protection for the rights of all individuals and opposes all forms of discrimination. Therefore, AAUW has a strong interest in the outcome of this case.

The **AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, (AFSCME)**, which represents approximately one million public employees, is the nation's largest public employee labor union. AFSCME represents many men and women in the health care and sanitation industries whose jobs continuously expose them to hazardous toxic substances and chemicals.

The **AMERICAN PUBLIC HEALTH ASSOCIATION**, founded in 1872, is a non-governmental society whose membership, including its state and local affiliates, is comprised of approximately 50,000 health professionals interested in promoting high scientific standards, action programs, and public policy for good health. Its reproductive health policy, adopted in 1979, "condemns the corporate practice of

forcing women to choose between their jobs and the right to reproduce [and urges governmental agencies to develop] occupational exposure standards that protect women, men, and the fetus."

The **AMERICAN SOCIETY OF LAW AND MEDICINE** was founded in 1972 to provide a forum for interdisciplinary discussion of the complex issues at the interface of law, medicine and health. Ongoing informational efforts include the publication of two quarterly journals, Law, Medicine and Health Care, a leading forum for interprofessional analysis of current issues, and the American Journal of Law and Medicine, a law review co-published with the Boston University School of Law. For the reasons stated in the attached brief, the Society opposes discriminatory policies that undermine public health goals.

The **CENTRAL NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH** is a not-for-profit organization dedicated to workers' health and safety rights. Its members include 40 area union locals, individual organized and unorganized workers, concerned health providers, attorneys, educators, and others. It believes the Seventh Circuit Court of Appeals decision in this case undermines the OSHA lead standard and the health of all workers. Furthermore, the decision simultaneously restricts women's employment opportunities and leaves men exposed to hazardous work conditions.

The **COALITION OF LABOR UNION WOMEN** is a membership organization of 20,000 female and male trade unionists who promote the rights of working women. The Coalition of Labor Union Women has, since its founding

in 1974, advocated workplace rules and practices that protect all workers.

The **COMMITTEE FOR RESPONSIBLE GENETICS** is a group of approximately 600 scientists and others concerned with social and ethical implications of biotechnology, including reproductive technology, which promotes the broadest possible public participation in development of relevant decisions. The Committee for Responsible Genetics opposes exclusionary employment practices because they violate workers' civil rights and fail to ensure the reproductive health of all employees in the workplace.

The **COMMUNICATION WORKERS OF AMERICA (CWA)** is an international trade union, representing 650,000 workers in information industries. It has many members -- both men and women -- exposed to toxic chemicals

in their work who are directly affected by the principles established in this case.

The **EMPLOYMENT LAW CENTER** is the principal project of the Legal Aid Society of San Francisco and is nationally recognized for its expertise regarding state and federal laws prohibiting employment discrimination. As an organization concerned with securing full equality in employment opportunities, the Employment Law Center has a strong interest in this case.

The **ENVIRONMENTAL DEFENSE FUND (EDF)**, is a non-profit advocacy organization with over 60,000 members nationwide. Since its founding in 1967, EDF has been involved in efforts to reduce human exposure to environmental toxins, including substances such as lead that are known to have serious reproductive and other health effects. EDF

has participated extensively in administrative, judicial and legislative proceedings on the control of lead in gasoline, drinking water, incinerator ash, point source emissions, consumer products, and in the workplace. EDF's concerns about lead toxicity extend to male-mediated effects of lead on reproductive function as well as female-mediated reproductive effects and other health effects on adults and juveniles of both sexes.

The **INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO** is a national labor organization headquartered in Akron, Ohio. It has over 300 affiliated local unions, in over 500 bargaining units representing about 50,000 hourly workers in the U.S. chemical industry. Many of its members are occupationally exposed to lead. The Union is concerned that a company may

discriminate in work assignments rather than reducing exposure levels to make the workplace safe for workers of both sexes. This is a particularly critical concern with exposure to material such as lead, which has demonstrable reproductive effects for men as well as women.

The **MASSACHUSETTS COALITION FOR OCCUPATIONAL SAFETY AND HEALTH (MassCOSH)** is a coalition of 85 labor organizations, representing over 150,000 workers and 150 occupational health professionals in Massachusetts. MassCOSH is dedicated to improving health and safety conditions in the workplace through technical assistance, training, and education and political action. MassCOSH, which has a reproductive hazards project and regularly conducts workshops with member locals regarding reproductive hazards in the workplace,

believes that all workers are entitled to a safe workplace.

The **NATIONAL ABORTION RIGHTS ACTION LEAGUE (NARAL)**, has over 400,000 members in 40 state affiliates and the national organization. Founded in 1969, NARAL is the largest national organization dedicated solely to keeping abortion safe, legal and accessible. NARAL recognizes that guaranteeing women the full range of reproductive choices is critical to women's autonomy and equality.

The **NATIONAL BLACK WOMEN'S HEALTH PROJECT**, is a health, education and advocacy organization which works to improve the quality of life for African-American women. It works to promote non-discriminatory approaches to insure that all African-American women have access to health services, including abortion, that

maximize maternal health, reduce infant mortality and produce healthy babies. Because poor African-American women are particularly vulnerable to economic coercion, the impact of exclusionary policies may be particularly severe for them.

The **NATIONAL ORGANIZATION FOR WOMEN (NOW)** is a national membership organization of approximately 150,000 women and men in about 700 chapters throughout the country. It is a leading advocate of women's equality in all areas of life. NOW has as one of its priorities the right to full employment opportunity without sacrificing health or reproductive rights.

The **NATIONAL WOMEN'S HEALTH NETWORK (NWHN)** is a public interest organization whose membership, comprised of 10,000 individuals and 400 organizations

representing 500,000 women, seeks to give women a voice in the health care system in the United States. NWHN supports women's right to have complete control over their bodies, particularly the right to decide when, where and how to give birth, and opposes policies which condition employment on the loss of fertility.

The **NATIONAL WOMEN'S POLITICAL CAUCUS (NWPC)**, is a nationwide membership organization dedicated to the election and appointment of more women to political office. NWPC also works to ensure equality for women in all aspects of life.

The **NATIONAL WOMEN'S LAW CENTER** is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the

Center has worked to secure equal opportunity in employment for women through, inter alia, the full enforcement of Title VII. It has a deep and abiding interest in assuring that victims of employment discrimination on the basis of sex, including pregnancy, have their rights vindicated under the law.

The **NATURAL RESOURCES DEFENSE COUNCIL, INC. (NRDC)**, is a non-profit, membership corporation headquartered in New York City. NRDC has a national membership composed of over 120,000 citizens dedicated to the defense and preservation of the human environment and the natural resources of the United States. Among the purposes of NRDC is to ensure that the laws designed to protect human health are fully and properly enforced and that all necessary steps are taken to reduce all risks, to males and to

females, resulting from exposure to toxic chemicals.

The **NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH (NYCOSH)** is a non-profit membership organization dedicated to the right of all workers to safe and healthy working conditions. Its membership includes over 160 union locals and regional councils, as well as individual workers, medical and legal professionals and community activists, all working together to eliminate workplace hazards. NYCOSH, which has a reproductive hazards committee, believes that exclusionary policies are not the appropriate solution to reproductive hazards in the workplace.

9 TO 5, NATIONAL ASSOCIATION OF WORKING WOMEN, is a nationwide membership group dedicated to improving the status and working conditions of office workers. For

more than fifteen years, 9 to 5 has been concerned with bringing attention to the health and safety hazards faced by working women. We strongly believe that employers should meet their legal obligations to provide safe workplaces to all workers, and are opposed to the exclusion of women as a substitute for correcting job hazards.

The **NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH PROJECT (NCOSH)** is a private, non-profit membership organization working to improve occupational safety and health conditions for all North Carolinians. Approximately 70 local unions representing 27,000 workers and 400 health and legal professionals concerned about occupational health are NCOSH members. NCOSH believes that exclusionary employment practices and policies are inappropriate and illegal solutions to the problem of dangerous

occupational exposures. Exclusionary policies violate the rights of women to pursue equal employment and the rights of all workers to a safe workplace.

The **NOW LEGAL DEFENSE AND EDUCATION FUND (NOW LDEF)** was founded as a non-profit women's rights law center in 1970 by founders of the National Organization for Women, and since that time has consistently worked on important legal cases and in advocacy and public education concerning the rights of women. NOW LDEF has particular concern for women's employment, reproductive and economic rights, all of which are threatened by irrational and discriminatory workplace policies such as that involved in this case.

The **OCCUPATIONAL SAFETY AND HEALTH LAW CENTER (OSHLC)** is a public interest law firm which represents individuals,

families, organizations, and unions in health and safety matters. The OSHLC has an on-going concern with regard to reproductive rights and the protection of both men and women on the job from any risk to those rights.

The **OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION (OCAW)** has 100,000 members, a substantial number of whom are employed in industries and are potentially affected by exclusionary employment policies similar to the one at issue in this case. The OCAW opposes exclusionary policies which single out members of one sex, and it actively seeks to develop and encourage the use of policies which will protect the health of all workers.

The **PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY AND HEALTH (PHILAPOSH)** is a private, non-profit corporation which

seeks to promote the health and safety of employees in Eastern Pennsylvania, Southern New Jersey, and the State of Delaware. PHILAPOSH has approximately 135 affiliated local unions with a combined individual membership of over 150,000. PHILAPOSH has regularly participated in litigation which raises important health and safety issues, either as a party or as amicus curiae. Over the last several years, PHILAPOSH has presented a number of workshops and conferences on reproductive hazards in the workplace and issues of particular concern to women workers.

PLANNED PARENTHOOD FEDERATION OF AMERICA (PPFA) is a not-for-profit corporation organized in 1922. It is the nation's oldest and largest voluntary family planning agency. Its 180 affiliates in forty-three states and the District of

Columbia provide medical, educational and counseling services to meet the family planning needs of over two million Americans per year. PPFA believes that the ability to regulate one's own fertility is a basic human right and is concerned that female workers not be penalized in their exercise of that right. The organization further believes that a resolution of this matter can and must be found that protects the health interests of all workers of both sexes and their children without sacrificing the workers' right to equal employment opportunity.

The **ROCHESTER COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH (ROCOSH)** is a non-profit organization comprised of unions, health and legal professionals, industrial hygienists, educators, and concerned individuals who believe all working people

are entitled to a safe and healthy workplace. Our union affiliates represent about 32,000 persons. ROCOSH is interested in this case because of its belief that working people should not have to choose between making a living or preserving their life and health. Upholding Johnson Controls' "fetal protection policy" would pervert OSHA's mandate that employers provide a safe workplace and threaten womens' employment opportunities. If allowed to stand, this decision could have implications for several workplaces in the Rochester area.

SANTA CLARA CENTER FOR OCCUPATIONAL SAFETY AND HEALTH (SC-COSH) is a group representing 170 labor unions, workers and occupational health professionals in northern California, dedicated to improving

health and safety conditions in the workplace.

The **SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU)** represents 925,000 workers in the U.S. and Canada. Its workers work primarily in the service sector, in a broad spectrum of workplaces including hospitals, offices, and food service facilities where they are exposed to toxic substances that adversely affect reproduction and health generally. The use of exclusionary practices, instead of a comprehensive approach to health protection, could threaten the economic status of a large number of members.

The **SILICON VALLEY TOXICS COALITION**, based in San Jose, California, includes labor unions, environmental organizations, doctors and other public health workers, firefighters, clergy, and neighborhood

organizations. It advocates that industry and government must protect the public health and works to prevent exposure of the public to toxic substances.

The **UNITED MINE WORKERS OF AMERICA, [INTERNATIONAL UNION (UMWA)]** is a 100-year old organization which represents approximately 150,000 miners and retirees in North America. The UMWA is committed to the complete elimination of impediments to job opportunities based on race and gender. The UMWA believes that employers must remove, and protect against, work-related health hazards. Barring women or others from jobs due to those hazards is an evasion of the employer's responsibility for workplace health and safety. Moreover, such exclusionary policies do not promote safety because men remain exposed to the hazards. Rather, these practices

shift the risks and burdens of an unhealthy work environment to those least able to bear them.

The **WESTERN NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH (WNYCOSH)** is an organization comprised of 60 area union locals (representing 55,000 workers) and a number of health professionals in the Western New York area. WNYCOSH is part of a consortium of organizations, including the Cornell-Chemical Hazards Information Program, the SUNY Buffalo Toxicology Research Center, and the Union Occupational Health Center Clinic, which cooperate in providing educational and technical assistance services to workers in the region. WNYCOSH is concerned that any judicial decision that undermines the OSHA lead standard is inappropriate since there

is evidence that lead constitutes a reproductive hazard for both sexes.

WOMEN EMPLOYED, based in Chicago, Illinois, has a national membership of 3,000. It assists working women with problems of sex discrimination and health and safety issues. The policy at issue in this case threatens womens' employment rights and is thus of concern to Women Employed.

The **WOMEN'S LAW PROJECT (WLP)** is a non-profit feminist law firm which seeks to advance the legal and economic status of women through litigation, public education, and individual counseling. During the past fifteen years of its existence, WLP's activities have included work in the areas of reproductive freedom, pregnancy discrimination, and employment discrimination. WLP is dedicated to

eliminating discrimination against women based on childbearing capacity and to securing the right of women workers to equal access to safe workplaces.

WOMEN'S LEGAL DEFENSE FUND is a national advocacy organization working to advance the rights of women in the areas of work and family. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of a significant employment discrimination counseling program, and through agency advocacy before the EEOC and other federal agencies that are charged with enforcement of the equal opportunity laws. It has had particular interest in implementation of the Pregnancy Discrimination Act, which it worked to pass in 1978.

NICHOLAS A. ASHFORD, J.D., PH.D., is an Associate Professor of Technology and Policy at the Massachusetts Institute of Technology. He has written extensively regarding reproductive hazards in the workplace. His publications include "Legal Considerations of Reproductive Hazards in Industry in the United States," in Pregnant Women at Work, edited by Geoffrey Chamberlain (The Royal Society of Medicine and The Macmillan Press Ltd., London, 1984), and "The Control of Reproductive Hazards in the Workplace: A Prescription for Prevention," (with Charles C. Caldart), Industrial Relations Law Journal, Volume 5, Issue 3, pp. 523-563 (1983).

DAVID BELLINGER, PH.D., and HERBERT NEEDLEMAN, M.D., are professors at the Harvard University School of Medicine and the University of Pittsburgh School of

Medicine, respectively. They join this brief because their research was cited by Johnson Controls as supporting its sex-based policy, a conclusion they believe is insupportable. They seek to ensure that their research is placed in its proper biological and epidemiological context.

EULA BINGHAM, M.D., is a professor of environmental health at the University of Cincinnati College of Medicine. She was the Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA) from 1977 through January, 1981, during which time OSHA's lead standard was promulgated. Thus, she was the government official responsible for reviewing and evaluating the submissions regarding OSHA's lead standard.

PHILIP J. LANDRIGAN, M.D., is the Director of the Division of Environmental

and Occupational Medicine at the Mount Sinai School of Medicine. Previously, he held numerous positions at the National Institute for Occupational safety and Health (NIOSH) and the Centers for Disease Control (CDC), including Chief of Environmental Hazards Activity, Cancer and Birth Defects Division at CDC.

DONALD R. MATTISON, M.D., is a Professor of Obstetrics and Gynecology and Professor of Interdisciplinary Toxicology at the University of Arkansas for Medical Sciences. He is the Chairman of the Human Toxicology and Risk Assessment Program, National Research Council of the National Academy of Sciences and has published extensively on reproductive toxicology.

JOHN F. ROSEN, M.D., is the Head of the Division of Pediatric Metabolism at the Albert Einstein College of Medicine. In

1984, he served as the Chairman of the Centers of Disease Control's Advisory Committee on Childhood Lead Poisoning Prevention, which has been cited by Johnson Controls in support of its policy. Dr. Rosen does not concur with the conclusions drawn by defendant from this report.

JEANNE STELLMAN, PH.D., is Associate Professor of Clinical Health, School of Public Health, Columbia University. Dr. Stellman has directed the Women's Occupational Health Resource Center, a non-profit organization that generates information regarding the occupational health needs of women workers through authoritative publications and research.

DIRECTORS OF OCCUPATIONAL MEDICINE PROGRAMS

The following are directors of university and hospital affiliated

occupational medicine programs. As specialists in the relationship between diseases and work or environment, they are especially concerned with preventing occupational health hazards. Their organizational affiliations are listed for identification purposes only:

EDDY BRESNITZ, M.D., Director of Occupational Medicine at the Medical College of Pennsylvania, Philadelphia, Pennsylvania.

PHILIP J. LANDRIGAN, M.D., Director of the Division of Environmental and Occupational Medicine at the Mount Sinai School of Medicine, New York, New York.

MARK CULLEN, M.D., Director of Yale-New Haven Occupational Medicine Program.

MARVIN S. LEGATOR, M.D., Director of Environmental Toxicology, Department of

Preventive Medicine and Community Health, University of Texas Medical Branch.

LAURA WELCH, M.D., Director of the Occupational Medicine Program at the George Washington University Medical Center, Washington, D.C.